In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11,074

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLANT

v.

M. R. LUSTER AND A. M. LUSTER, INDIVIDUALLY AND AS CO-PARTNERS, DOING BUSINESS AS SUNBEAM FURNITURE SALES CO., APPELLEES

APPELLANT'S BRIEF

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AUTHORITIES CITED

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APPELLANT'S BRIEF

This is an appeal from a final judgment of the United States District Court for the Southern District of California, Central Division, in an action brought by the Price Administrator to enjoin defendants from violating the General Maximum Price Regulation (7 F. R. 3153), issued under the Emergency Price Control Act, as amended (56 Stat. 23, 50 U. S. C. App. Sec. 901, et seq.).

JURISDICTION

Jurisdiction of the District Court was invoked under Section 205 (*c*) of the Act. The jurisdiction of this Court is invoked under Section 128 of the Judicial Code (28 U. S. C. Sec. 225). The judgment was entered on December 14, 1944 (R. 20–22). A motion for rehearing and to amend the findings of fact, con-

clusions of law and judgment was filed on December 26, 1944 (R. 22–25) and was granted on February 2, 1945 (R. 27–31). Amended findings of fact and conclusions of law were filed on February 12, 1945 (R. 31–37). An amended judgment was filed on the same day (R. 37–39). Notice of appeal was filed on May 10, 1945 (R. 39).

STATUTES AND REGULATIONS INVOLVED

The action involves the Emergency Price Control Act of 1942, as amended, and the General Maximum Price Regulation issued thereunder. The pertinent sections of the Act are (Sections 2 (a), 203, 204 and 205 (a)) and the pertinent provisions of the Regulation are (Sections 2, 3 (a), 3 (c) and 12). None of the issues on this appeal turn upon a construction of either the Act or the Regulation. The following is, however, a brief resumé of the more important provisions of each:

Briefly, Section 2 (a) of the Act authorizes the Price Administrator to issue orders or regulations establishing maximum prices for commodities; Sections 203 and 204 prescribe the procedure by which the constitutionality and statutory validity of such orders and regulations may be tested; and Section 205 (a) provides for the enforcement of such orders by a suit in equity.

The Regulation was issued under Section 2 (a) of the Act and establishes maximum prices for all commodities not covered by other regulations or specifically excepted. Section 2 of the Regulation prescribes a series of 12 mutually exclusive pricing rules, to be applied in sequence, for determining the maximum price of a commodity. These rules are applicable only

where the same or a similar commodity was sold or offered for sale by the same seller or his closest competitor in March 1942. If none of these rules is applicable, then Section 3 (a) of the Regulation directs that the maximum price is to be determined by applying a prescribed formula. The price so determined must be promptly reported to the Office of Price Administration. Section 3 (c) of the Regulation provides that if the maximum price of any commodity cannot be determined by any of the foregoing methods, it shall not be sold until the seller has first submitted a proposed price to the Office of Price Administration, and that office has approved the proposed price, or has fixed another or has failed to act within 20 days. Section 12 of the Regulation requires every person selling any commodity subject to the regulation to prepare and keep records showing both the prices currently charged by him, and the manner in which his maximum prices were determined.

STATEMENT OF FACTS

Defendants are co-partners who since October 1942 have been engaged in the wholesale furniture business in the course of which they sold various commodities subject to the General Maximum Price Regulation (R. 8–9). Alleging that the defendants had violated the Regulation (a) by failing to keep the records required by Section 12, (b) by failing to compute their maximum prices as required by Section 2 of the Regulation, and (c) by failing to make the reports required by Section 3 (a) of the Regulation, the Administrator brought this suit to enjoin the defendants from continuing to violate the Regulation (R. 4–5). The defendants answered denying the material allegations of

the complaint and pleading, as a defense, good faith and inadvertence. After trial on the merits, the court found that the defendants had violated the regulation by failing to prepare and keep the records required by the Regulation, and by failing to determine the maximum prices for the commodities sold by them in accordance with the rules and formulas prescribed by the Regulation (R. 12, 14–17).

On the basis of these findings the court below entered a judgment commanding defendants to comply with the requirements of Sections 3 (c) and 12 of the Regulation and permanently enjoining them "from selling, delivering, transferring or offering to sell, deliver or transfer commodities at prices in excess of the prices permitted by the General Maximum Price Regulation as heretofore *or hereafter amended, or any other regulation promulgated by the Office of Price Administration governing the maximum prices*" of the particular commodities involved, and "from doing or omitting to do any other act in violation of the General Maximum Price Regulation *as heretofore or hereafter amended*" (R. 20–21).

Subsequently, on motion of the defendants, the court struck from the judgment the first group of words italicized above, and substituted for the second group of words italicized above the words "in effect at the time of filing this action" (R. 29).

SPECIFICATION OF ERROR

The court erred in restricting the injunction to violations of the Regulation as it read at the time of the filing of the action.

ARGUMENT

I

The judgment was not amended in the exercise of discretion but because of an error of law which should be corrected on appeal

It is clear from the order amending the judgment that it was not made in the exercise of discretion. On the contrary, it was made because the court was of the opinion that if the injunction were to include future amendments to, and substitutions of, the regulation, the defendants would be deprived of their right to challenge the validity of such amendments and substitutions in the Emergency Court of Appeals.[1] As we shall develop later, this was a clear error of law. Such an error is reviewable and will be corrected on appeal. For, while an appellate court will not interfere with a trial court's exercise of discretion in the absence of a showing it has been improvidently exercised, nevertheless, where it is clear that the trial court acted on a mistaken conception of the law or pertinent facts, an appellate court will not hesitate to correct the error. *Union Tool Company* v. *Wilson,* 259 U. S. 107;

[1] Thus the court in the order amending the judgment said:

"It is the opinion of the Court that to require the defendants to be bound by, or to require the defendants to be subject to, penalties for the violation of 'any other act in violation of the regulations' or for 'offering, soliciting, attempting or agreeing to do any of the foregoing,' or to compel defendants to be bound by any future regulation, *would deprive the defendants of their day in court, and would be a denial of the right of the defendants if the Court found that in good faith they should be permitted to attack a regulation before the Emergency Court of Appeals;* in all other respects the Findings of Fact, Conclusions of Law and the judgment are affirmed." [Italics supplied.] (R. 30.)

Bowles v. *Simon,* 145 F. 2d 334 (C. C. A. 7th, 1944); *Peterson* v. *John Hancock Mutual Life Ins. Co.,* 116 F. 2d 148 (C. C. A. 8th, 1940); *Home Owners Loan Corp.* v. *Huffman,* 134 F. 2d 314 (C. C. A. 8th, 1943).

II

The original decree did not deprive defendants of their right to challenge the validity of future amendment to and substitutions of the regulation in the Emergency Court of Appeals

In assuming that if the injunction embraced future amendments to, and substitutions of, the Regulation the defendants would be deprived of their opportunity to contest the validity of such amendments and substitutions, the trial court was clearly in error.

The Emergency Price Control Act of 1942, as amended by the Stabilization Extension Act of 1944, provides two procedures whereby the constitutionality or statutory validity of orders and regulations establishing maximum rents and prices may be judicially reviewed. The first may be resorted to as of right; the second may be resorted to only with the permission of a court in which a proceeding to enforce the order or regulation is pending, which permission may be granted or withheld by the court in the exercise of a sound judicial discretion.

The first procedure is provided by Sections 203 and 204 (a)–(d) of the Act. Under this procedure any person subject to any provision of any regulation, or order promulgated under the Act may at any time file a protest with the Administrator setting forth any such protest. If the protest is denied in whole or in part, the protestant may file an action in the Emer-

gency Court of Appeals, which, if it determines that the provision is arbitrary, capricious or not in accordance with law, may set the order or regulation aside. Cf. *Lockerty* v. *Phillips,* 319 U. S. 182; *Yakus* v. *United States,* 321 U. S. 414; *Bowles* v. *Willingham,* 321 U. S. 503.

The second procedure for testing the validity of an order or regulation issued under the Act is provided by Section 204 (e) of the Act, which was added by the Stabilization Extension Act of 1944. Under this procedure the defendant against whom a civil or criminal proceeding has been brought under Section 205 to enforce any provision of any order or regulation issued under the Act may apply to the court in which such proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to any provision which the defendant is alleged to have violated. The court may grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with Section 203 (a). If the proceeding is one to enjoin the defendant from violating the order or regulation, a temporary restraining order must issue enjoining the defendant from violating the order while the validity of the order is being tested in the Emergency Court of Appeals. If the provision objected to is determined to be invalid, then the judgment in the enforcement proceeding must be vacated and the proceeding dismissed.

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From the foregoing it is clear that the first of the two procedures would always be available to the defendants to challenge the validity of any future amendments to, or substitutions of, the regulation. The court, therefore, was plainly in error in assuming that if the injunction were made to embrace such amendments and substitutions the defendants would be deprived of the opportunity of contesting their validity. This misconception of law is sufficient in and of itself to require a reversal of the judgment.

It is true that the second procedure would not be available to the defendants in any proceedings to punish them for contempt for violating the injunction. See *Taub* v. *Bowles,* 149 Fed. 817, and *Howat* v. *Kansas,* 258 U. S. 181. But the language of the statute, its legislative history, and indeed the whole statutory plan for the judicial review of maximum price and rent orders and regulations make it plain that that procedure should not be available except in rare and exceptional cases. As Judge Leamy said in *United States* v. *Aronin,* 57 F. Supp. 186, 191 (S. D. N. Y. 1944):

> Persons who are thus brought into Court by the Government for violation of the wartime inflation control measures should not be encouraged to regard the new stay procedure as an instrument for obstruction and delay or as a means of thwarting the just processes of the law. It could not have been the intention of Congress that the new stay procedure should develop into a means of frustrating the proper enforcement of wartime price controls, nor did Congress intend that stays under the new pro-

cedure should be available indiscriminately to all defendants who might take the trouble to file a petition setting forth mere pro forma grounds for a stay. Hence Congress surrounded the discretionary authority of the District Court in this regard with plain and strongly worded conditions as to the formulation and pertinence of "objections," and as to "good faith" challenges against the regulations, and convincing "excuse" for failure to invoke the regular statutory review procedure.

The legislative history makes it clear that Congress looked to the courts to prevent abuse of the new procedure and to insure that this procedure would operate in such a way as to give just treatment to deserving defendants, rather than in such a way as to cripple the Government's efforts to enforce these vital wartime controls.

The intent of Congress was clearly stated by Senator Wagner when he presented to the Senate the report of the Senate Conferees on the renewal Act:

"The Price Administrator has expressed great concern lest the right accorded by this procedure be abused by defendants resorting to protests and leaves to complain as a means of deferring or even avoiding the trial of criminal cases and of staying the execution of judgment in civil proceedings. But the procedure provided in the amendment does not represent a regular method to be followed in enforcement cases. Rather, it is an exceptional procedure which has been made available to avoid the risk of injustice that existed under the original act under which a defendant who had excusably

failed to file a protest within the strict time limits the act allowed, might be denied any opportunity to question the validity of the regulation which he was charged with violating. The remedial procedure prescribed by the conference committee is available only to defendants whose objections the courts find have been made in good faith, and not primarily for the purpose of delay. The committee is confident that the courts will be vigilant in administering the standards of good faith to deny stays to defendants who have not previously availed themselves of the unrestricted opportunity to protest but who have been violating the regulations on the gamble that, if caught, they could then protest and secure stays of proceedings which would afford them a good chance to avoid the trial or the execution of judgment." Cong. Rec. (Senate), 78th Cong., 2d sess., June 21, 1944, p. 6451.

It is apparent, then, that everything points to a strict and rigidly limited use of the new stay procedure. Enforcement actions under the Price Control Act should not be subjected by the new statute to the constant hazard of an automatic stay upon mere application by a defendant. A stay application, in order to be entitled to favorable action by a court, must have more to recommend it than the natural desire of every wrongdoer to postpone legal reckoning. We have the strictly conditional terms of the statute as an explicit Congressional declaration of just what showing a defendant must make in order to recommend himself to a court under the new stay provisions, and where the defendant cannot meet these conditions

clearly and substantially, it would be an abuse of authority if the application was not denied.

The defendant's application for leave to present objections against Maximum Price Regulation No. 178 in the statutory review forum, and for a stay of further proceedings in this case is denied.

As shown by the foregoing decision, which has been cited and followed by every district court to which an application to invoke the second procedure has been presented, that procedure was not intended to be available to one who fails to act in good faith and with the utmost diligence. Warned as they are by the injunction of their duty to obey and abide by the regulation, defendants would not be acting in good faith or with diligence should they fail promptly to invoke their remedy under the first procedure in respect to any future amendment or substitution which they consider to be invalid. Therefore, even if the injunction did not embrace future amendments and substitutions, defendants would not be entitled to invoke the second procedure in any proceeding brought to enforce such amendments and substitutions, for the simple reason they would not be able to make the necessary showing. Assuming that they could make the necessary showing, which seems inconceivable, then, if the injunction embraced such amendments and substitutions, while the statutory provision creating the second procedure would be inapplicable, the court, in the exercise of its inherent powers, could continue any contempt proceedings while the validity of such amendments and substitutions are being tested under the first procedure. *Landis* v. *North American Company,* 299 U. S.

248. It is true that the defendants would not be entitled to such a continuance as of right, but neither would they be entitled to invoke the second procedure as of right. Whether a continuance of contempt proceedings should be granted and whether a defendant in an enforcement proceeding other than a contempt proceeding should be permitted to invoke the second procedure are both matters which rest in the sound discretion of the court.

Admittedly, if the injunction were made to embrace future amendments and substitutions, the defendants would be required to obey them while their validity is being tested under the first procedure, but the same would be true if the second procedure were available to the defendants. Section 204 (e) expressly provides that as a condition to granting leave to invoke the second procedure, the court shall issue a temporary restraining order enjoining the defendant from violating the regulation while its validity is being tested. Defendants, therefore, are in no position to complain of the nonavailability of the second procedure, and the nonavailability thereof is not a valid ground for restricting the injunction so as to exclude future amendments and substitutions.

III

The Court erred in restricting the injunction to the regulation as it read when it was issued

The General Maximum Price Regulation, which is the regulation involved in this action, was promulgated on April 28, 1942 to cover, with certain specified exceptions, all commodities and services subject to regu-

lation under the Act. The issuance of such a comprehensive regulation was necessary in order to impose immediately an over-all ceiling on the entire economy before special studies of the various industries and trades permitted the issuance of price regulations for specific commodities and services. Since then, 592 maximum price regulations have exempted from the General Maximum Price Regulation numerous commodities and services, and subjected them to specific price controls. At any time it may be necessary to take the same measure with regard to the commodities involed in this action. In addition, the text of the General Price Regulation itself has been modified by 65 amendments since its original promulgation.

These numerous changes were and are unavoidable in view of the fact that price control covers the entire economy of the nation at a period of profound economic wartime dislocations. As economic conditions change almost from day to day, maximum price regulations and especially the basic General Maximum Price Regulation must be constantly amended in order to preserve at all times a price level that is "generally fair and equitable" as required by the Act. This necessity for the constant revisions of price regulations has been judicially recognized. Indeed it must be self evident. In *Bowles* v. *May Hardwood Company,* 140 F. 2d 914, Judge Simon, speaking for the Circuit Court of Appeals for the Sixth Circuit, said:

> * * * If, in the complexity of a price ceiling on hundreds or thousands of varying kinds and grades of commodities, which from period

> to period must be revised to meet continuing changes in economic conditions, demand and supply, the effect of weather, labor supply and other elements of production, past derelictions will not support injunctive restraint of similar or related acts. Section 205 (a) is rendered completely nugatory, as a means of enforcing the Act, and traders may not be brought into subordination of a regulation, except by a myriad of injunction suits, each limited to a particularized grade or species of a general classification, and based upon violation of the regulation only in respect to such grade or species.

These facts make it absolutely necessary, as the foregoing language of the Circuit Court of Appeals clearly implies, for an injunction compelling obedience to a price regulation to embrace future amendments to, and substitutions for, the regulation. To restrict the injunction to the regulation as it read when the action was instituted would not only free the defendants from restraint from violating provisions of the regulation which may be strengthened or made more stringent in the future, but it would also require them to obey provisions thereof which may be relaxed, and would thus be unfair both to the Government and to the defendants.

Injunctions dealing with future contingencies have frequently been upheld by the courts. Thus, in *Bitterman* v. *Louisville & Nashville Railroad Company*, 207 U. S. 205, 28 S. Ct. 91 (1907), dealers who had customarily purchased and resold the return portions of nontransferable reduced round-trip tickets were enjoined by the district court from continuing such deal-

ings with regard to two specific forthcoming ticket issues only. The Circuit Court of Appeals enlarged the lower court's decree to make it cover all future ticket issues of that class. In upholding the appellate court's action, the Supreme Court held (99):

> * * * It is insisted that the circuit court of appeals erred in awarding an injunction as to dealings "in nontransferable tickets that may be hereafter issued * * * since it thereby undertook to promulgate" a rule applicable to conditions and circumstances which have not yet arisen, and to prohibit "the petitioners from dealing in tickets not *in esse* * * * and is, therefore, violative of the most fundamental principles of our government." But when the broad nature of this proposition is considered, it but denies that there is power in a court of equity in any case to afford effective relief by injunction. Certain is it that every injunction, in the nature of things, contemplates the enforcement, as against the party enjoined, of a rule of conduct for the future as to the wrong to which the injunction relates. * * *

Similarly, injunctions have issued extending to future tariffs in *New York, New Haven & Hartford Railroad Company* v. *Interstate Commerce Commission,* 200 U. S. 361, 26 S. Ct. 272 (1906); and to future resale prices in *Calvert Distilling Co.* v. *Brandon* (W. D. S. C. 1938), 24 F. Supp. 857, and in *Calvert Distillers Corp.* v. *Stockman* (E. D. N. Y. 1939), 26 F. Supp. 73.

While the precise issue presented by this appeal has never before been litigated as such in any case arising

under the Act, injunctive decrees of equal or greater scope have been issued in numerous cases.

Thus, in *Bowles* v. *Augustine,* 149 F. 2d 93, (C. C. A. 9th, 1945), where the defendant had sold meat at over-ceiling prices, this Court upheld an injunction restraining his from

> * * * selling or offering for sale * * * at prices in excess of those established by RMPR Nos. 169 and 148, both as amended * * * or otherwise violating or attempting to do anything in violation * * * of any Regulation or Order adopted pursuant to the Emergency Price Control Act of 1942, establishing maximum prices for any of said meat items.[2]

In *Taylor* v. *Bowles,* 147 F. 2d 824, (C. C. A. 9th, 1945), this Court affirmed an injunction against defendants, who had violated the maximum rent, the eviction, and the reporting provisions of Maximum Rent Regulation No. 28. This order restrained them from

> * * * otherwise violating or attempting or agreeing to do anything in violation of said Maximum Rent Regulation as heretofore or hereafter amended or extended or * * * any other regulation or order relating to rent for housing accommodations heretofore or hereafter adopted pursuant to said Act as heretofore or hereafter amended or extended.

In thus upholding an order extending even to future amendments of the Act itself, this Court recognized

[2] The same order covering all present and future regulation of the commodity involved was issued in *Bowles* v. *Newman and Korn, Inc.*, (N. D. Cal., 1944), not reported.

the necessary continuity and unity of the entire system of wartime price control.

In another recent case arising under the Regulation, *Bowles* v. *Sanden and Ferguson,* 149 F. 2d 320, (C. C. A. 9th, 1945), this Court ordered the entry of an injunction covering all regulations issued under the Act. In reversing the lower court's dismissal of the action, this Court ordered that an injunction be entered restraining defendants from

> * * * selling * * * or offering for sale * * * any commodity in violation of the General Maximum Price Regulation as heretofore or hereafter amended or revised, and attempting or agreeing to do anything * * * in violation of any regulation adopted pursuant to said Section 2 (a) of the Act.

Similar decrees extending to future amendments and regulations were issued in so many cases as to have become the norm. Only a few of the more important decisions are listed in the footnote.[3]

The clause extending the injunctions to future amendments to and substitutions of the regulation was, therefore, not only proper and customary, but absolutely necessary, and it was error to eliminate it from the original decree.

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[3] *Bowles* v. *Simon*, 145 F. 2d 334 (C. C. A. 7th, 1944); *Bowles* v. *Heinel Motors* (C. C. A. 3rd, June 13, 1945) not yet reported, affirming *Bowles* v. *Heinel Motors*, 59 F. Supp. 759 (E. D. Pa., 1944); *Bowles* v. *Montgomery Ward and Co.*, 147 F. 2d 858, (C. C. A. 7th, 1944); *Brown* v. *Mars, Inc.*, 135 F. 2d 843, cert. denied, 320 U. S. 798 (C. C. A. 8th, 1943); *Henderson* v. *Burd*, 133 F. 2d 515 (C. C. A. 2d 1943); *Bowles* v. *Sisk*, 144 F. 2d 163, (C. C. A. 4th, 1944).

CONCLUSION

It is respectfully submitted that the judgment should be reversed, and the cause remanded with direction to reenter the original decree.

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